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Supreme Court of the United States

OCTOBER TERM, 1948

NO. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation, Petitioner,

v.

ROYAL INSURANCE COMPANY, LTD., Respondent.

Upon Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

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INDEX.

PAGE

Statement of the Case 2

The Questions Presented 4

ARGUMENT

I. The sole issue for trial was whether there had been a mutual mistake in the writing of the policy, so that it should be corrected to conform to the mutual intent of the parties. There is no constitutional right to jury trial of such equitable issue 5

1. What the issue for trial was 5

2. A mutual mistake made in reducing an agreement to writing, when relied upon in defense to an action on the instrument, raises an equitable issue which is not for jury trial 7

3. Right to jury trial of an equitable issue is not created by statutes or rules permitting pleading of such issue in law action 17

II. Since the equitable issue of mutual mistake, rather than a legal issue, was involved, the District Court's order for trial of such issue by the Court should not be interpreted as an "injunction" order appealable under the doctrine of Enelow v. New York Life Insurance Company, 293 U.S. 379 (1935) and kindred cases 23

PAGE

III. Petitioner's appeal was dismissible because, as the Court of Appeals said, in complaining of an order for non-jury trial of an equitable issue, the appeal presented no question of substance 27

TABLE OF CASES CITED.

Adamos v. New York Life Ins. Co., 293 U.S. 386 (1935) 23

Allegheny Valley Brick Co. v. Raymond, 219 Fed. 477 (CCA 2, 1914) 13

American Life Ins. Co. v. Stewart, 300 U.S. 203 (1937) 8

Beaunit Mills v. Eday Fabric Sales Corp., 124 F. (2d) 563 (CCA 2, 1942) 26

Bellavance v. Plastic-Craft Novelty Company, 30 F. Supp. 37 (D.C., Mass., 1939) 20

Brolan v. United States, 236 U.S. 216 (1915) 27

Buena Vista Co. v. Billmyer, 48 W. Va., 382 (1900) .. 16

Bynum v. Prudential Ins. Co., 7 F.R.D. 585 (E.D., S.C., 1947) 20

Camden v. McCoy, 48 W. Va. 377 (1900) 16

Donnelly v. Northwestern Life Ins. Co., 59 F. (2d) 46 (CCA 5, 1932) 28

Ehelow v. New York Life Ins. Co., 293 U.S. 379 (1935) 2, 18, 23

Ettelson v. Metropolitan Life Ins. Co., 317 U.S. 188 (1942) 23

Ettelson v. Metropolitan Life Ins. Co., 137 F. (2d) 62 (CCA 3, 1943) 15, 20, 25

PAGE

Ewer v. Washington Ins. Co., 16 Pickering 502 (1835) 15

Garage Equipment Co. v. Danielson, 156 Wis. 90, 144 N.W. 284 (1913) 13

General Accident Fire & Life Ins. Co. v. Owen Building Co., 195 Mo. App. 371, 192 S.W. 145 (1917) 15

Holmes v. Charlestown Insurance Co., 10 Metcalf 211 (1845) 15

Hurst v. Hurst, 7 W. Va. 289 (1874) 16

Knowlton v. Campbell, 48 W. Va. 294 (1900) 16

Kyle v. Kavanagh, 103 Mass. 356 (1869) 11, 12

Liberty Oil Company v. Condon National Bank, 260 U.S. 235 (1922) 17, 18, 29

Logan v. Holman, 7 F.R.D. 596 (D.C., N.J., 1947) 20

Lumber Underwriters v. Rife, 237 U.S. 605 (1915) .. 7, 8

Neary v. General American Life Ins. Co., 140 Neb. 756, 1 N.W. (2d) 908 (1942) 6, 14

New York etc. Co. v. Preferred Underwriters, 252 Mass. 1, 146 N.E. 905 (1925) 15

Northern Assurance Co. v. Grand View Building Association, 183 U.S. 308 (1902) 7

Northern Assurance Co. v. Grand View Building Association, 203 U.S. 106 (1906) 7

Paxton Lumber Co. v. Panther Coal Co., 83 W. Va. 341 (1919) 11

Philippine Sugar Estates Development Company v. Philippines, 247 U.S. 385 (1918) 28

Raffles v. Wichelhaus, 2 H. & C. 906 (1864) 11, 12

Ring v. Spina, 166 F. (2d) 546 (CCA 2, 1948) 27

Snell v. Atlantic Fire and Marine Insurance Co., 98 U.S. 85 (1878) 8

PAGE

Susquehanna Co. v. Anderson, 239 N.Y. 285, 146 N.E. 381 (1925) 21
Union Mutual Life Ins. Co. v. Mowry, 96 U.S. 544 (1878) 7, 9, 15
United States v. Lane, 232 U.S. 598 (1914) 27
Upson Nut Co. v. American Shipbuilding Co., 251 Fed. 707 (N.D., Ohio, 1918) 28
Van Syckel v. Dalrymple, 32 N.J. Eq. 233 (1880) 15
Williams Manufacturing Co. v. Insurance Co. of North America, 95 Vt. 132, 113 Atl. 780 (1921) 14
Wilson v. Queens Ins. Co., 5 Fed. 674 (1881) 12

MISCELLANEOUS AUTHORITIES CITED.

17 Corpus Juris Secundum 495 12
14 Ency. Pl. & Prac. 35 17
55 Harvard Law Review 861 26
3 Moore's Federal Practice, 1947 Supplement, pp. 33-5 26
2 Williston on Contracts, pp. 1221, 1224 10

TABLE OF STATUTES CITED.

Act of June 19, 1934, 48 Stat. 1064, 28 U.S.C.A. 723 b 19
Federal Judicial Code, Section 129, 28 U.S.C.A. 227 .. 4
Federal Judicial Code, Section 274, (b), 28 U.S.C.A. 398 17
New Federal Judicial Code, 28 U.S.C.A. 2072 19
West Virginia Code, Chapter 33, Article 4, Section 9 6

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NO. 396

CITY OF MORGANTOWN, WEST VIRGINIA,
a municipal corporation, Petitioner,

v.

ROYAL INSURANCE COMPANY, LTD., Respondent.

Upon Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR RESPONDENT

Petitioner complains of a judgment of the Circuit Court of Appeals for the Fourth Circuit dismissing petitioner's appeal from an order of the District Court for the Northern District of West Virginia, entered on May 3, 1948, denying a jury trial of the single issue presented in this case. The issue was whether the policy in suit should stand, as written, as a fire insurance policy, or whether, because of an alleged mistake in writing it, the coverage provision of the policy should be corrected so as to make it a windstorm insurance policy, in conformity with what respondent alleged was the mutual intent and understanding of the parties. Thus, the issue was one of *mutual mistake*.

The Court of Appeals, in its opinion reported in 169 F. (2d) 713, said petitioner's appeal was dismissible on

two different grounds: (1) because the order for a non-jury trial was not, in the situation here presented, equivalent to the grant of an interlocutory injunction within the doctrine of *Enelow v. New York Life Insurance Company*, 293 U. S. 379 (1935); and (2) because "the appeal presents no question of substance" (R. 30).

STATEMENT OF THE CASE.

On March 22, 1946, petitioner purchased from respondent a windstorm policy in the amount of $22,000.00 covering the hangar at the Municipal Airport, the term of the policy being from March 22, 1946 to March 22, 1947. The windstorm premium was 20¢ per $100.00 for the one-year term, making a total annual premium of $44.00. On March 22, 1947, when the windstorm policy expired, respondent's local agent issued to petitioner the policy in suit; this policy, also in the amount of $22,000.00, was for a term of one year commencing on March 22, 1947, and carried the correct annual windstorm premium of $44.00.

Respondent alleges that the policy issued on March 22, 1947 was intended by the parties to be merely a renewal of the expiring windstorm policy, but that, through an oversight on the part of the local agent, the premium and coverage figures in the renewal policy were inserted in the blank spaces on the policy form opposite the words "Fire and Lightning", instead of on the line opposite the words "Windstorm and Hail" as they had been on the prior policy (R. 13). The result was that, as written and issued, the policy of March 22, 1947 described the coverage as insurance against loss by fire, notwithstanding the fact that the premium of $44.00 inserted in the policy was the rate for windstorm insur-

ance. The annual premium on a $22,000.00 fire insurance policy would have been $338.38, as contrasted with the small windstorm premium of $44.00 (R. 3). At another place in the policy, though not in the coverage clause, the word "Windstorm" had been typed on the policy form (R. 17).

The mistake in the writing of the renewal policy was not discovered until after a fire destroyed the hangar on August 20, 1947. There was no windstorm loss.

Mindful of the fact that, from the time of the discovery, it might be charged with laches in asserting the mutual mistake, respondent instituted its action for reformation and correction of the policy in the District Court on October 29, 1947. Petitioner did not then challenge respondent's reformation action on the ground that the latter had any adequate remedy at law. Instead, petitioner responded to the action (1) by filing its answer denying any mutual mistake in the writing of the March 22, 1947 policy, and alleging that it was properly written as a fire insurance policy; and (2) by filing its counterclaim seeking recovery upon the policy as a fire insurance policy. Respondent answered the counterclaim, admitting that the hangar had been destroyed by fire, but asserting that the policy in suit, upon being reformed and corrected to conform to the mutual intent and understanding of the parties, would be a windstorm policy, and not a fire insurance policy. What this then left in the case for trial was aptly described by Judge Parker in the opinion of the Circuit Court of Appeals:

> "The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff,

defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything, since the policy in that event would not cover the loss. It seems perfectly clear that the issue is an equitable one, triable before a chancellor in equity under the old practice, and that no relief could have been afforded at law." (R. 29).

With the case in this posture, the District Court held that the trial of the mutual mistake issue, which was the only disputed issue for trial, either in the main action or on the counterclaim, should be by the court without a jury. It is from such ruling that petitioner has sought to appeal.

THE QUESTIONS PRESENTED.

Respondent conceives that the questions here presented are: (1) whether the District Court's order denying a jury trial of the mutual mistake issue should be construed, in the technical sense, as an "injunction" appealable under Section 129 of the judicial Code, 28 *U.S.C.A.* 227;* and (2, whether, as the Court of Appeals below said, petitioner's appeal was also dismissible on the ground that "the appeal presents no question of substance". (R. 30).

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* In the new Federal Judicial Code, effective September 1, 1948, Section 129 is embodied as 28 *U.S.C.A.* 1292.

ARGUMENT.

I.

THE SOLE ISSUE FOR TRIAL WAS WHETHER THERE HAD BEEN A MUTUAL MISTAKE IN THE WRITING OF THE POLICY, SO THAT IT SHOULD BE CORRECTED TO CONFORM TO THE MUTUAL INTENT OF THE PARTIES. THERE IS NO CONSTITUTIONAL RIGHT TO JURY TRIAL OF SUCH EQUITABLE ISSUE.

At the outset, it seems desirable to define the precise issue which confronted the District Court at the time it entered the order denying a jury trial.

1. What the Issues for Trial Was.

This case had its inception as an action by the insurance company for reformation of the policy. In such action, respondent alleged that the parties intended to effect windstorm insurance, but that, through mistake, the policy was written to cover against loss by fire, so that it did not correctly express the mutual intent of the contracting parties. Petitioner answered, denying that any mutual mistake had been made, and counterclaimed upon the policy as written. To the counterclaim, respondent's sole defense was the alleged mutual mistake made in the writing of the policy, for which correction had already been sought in the reformation action.

Thus, on the counterclaim as well as in the reformation action, there was only one issue for trial in the District Court—whether the policy, as written, did or did not conform to the actual agreement and intent of the parties. Petitioner said it did; respondent said it did not. Both parties took the position that a binding agreement between them had been effected; the only

question was what that agreement actually was, and whether the policy as issued was a correct memorial of it. In short, the sole issue involved was the existence or non-existence of *mutual mistake* in writing up the agreement of the parties, and the right of respondent to seek correction of such mistake.* When both contracting parties intended the same thing, but it is not correctly expressed in the written agreement, the mistake is "mutual", though the error in draftsmanship was the act of only one of the parties: *Neary v. General American Life Insurance Company,* 140 Neb. 756, 1 N.W. (2d) 908 (1942).

On the counterclaim, as in the reformation action, there is nothing in the case to try, aside from the mutual mistake issue. The counterclaim involved no issue for measurement of damages, for the *West Virginia Code,* Chapter 33, Article 4, Section 9, fixes the recovery, if any, at the face amount of the policy when there is a total loss: "All fire insurance companies doing business in this state shall be liable, in case of total loss by fire or otherwise, as stated in the policy on any real estate insured, for the whole amount of insurance stated in the policy of insurance upon such real estate."

Thus, if respondent fails to sustain its contention that the policy as written did not conform to the mutual

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* Petitioner's contention that respondent might be estopped, because of laches, negligence, or otherwise, from seeking relief against the alleged mistake in the coverage of the policy, is pointless in any consideration of the appropriate method of trial. If the issue of mutual mistake is the proper subject for a trial by the court, petitioner's grounds, if any, for asserting that respondent is estopped from obtaining correction of the mistake are for determination at such trial; they furnish no basis for a different method of trial.

intent and agreement of the parties, petitioner would be entitled to recover the face amount of the policy. As Judge Parker concisely stated in the opinion of the Court of Appeals below:

> "The only issue in the case is the issue of mutual mistake. If that is decided against plaintiff, defendant is entitled to recover on its policy. If it is decided in plaintiff's favor, defendant is not entitled to recover anything. * * *". (R. 29).

2. A Mutual Mistake Made in Reducing an Agreement to Writing, When Relied Upon in Defense to an Action on the Instrument, Raises an Equitable Issue Which is not for Jury Trial.

Petitioner concedes that when mutual mistake is asserted in an action to reform a written instrument, and to recover upon it as reformed, the issue raised is equitable in character, and no right to jury trial exists. The rule that a written instrument cannot be reformed in a law action is too well settled for argument: *Union Mutual Life Insurance Company v. Mowry,* 96 U.S. 544 (1878); *Lumber Underwriters v. Rife,* 237 U.S. 605 (1915). And compare *Northern Assurance Company v. Grand View Building Association,* 183 U.S. 308 (1902) with *Northern Assurance Company v. Grand View Building Association,* 203 U.S. 106 (1906). In the latter case, this Court sustained reformation of an insurance policy in equity after declining to permit the terms of the same policy to be reformed or varied in an earlier law action.

The basis of the rule, of course, is that at law parol evidence is not admissible to vary the terms of a written instrument. As Mr. Justice Holmes said in *Lumber Underwriters v. Rife, supra,* at page 610:

> "Of course, if the insured can prove that he made a different contract from that expressed in the writing, he may have it reformed in equity. What he cannot do is to take a policy without reading it, and then, when he comes to sue at law upon the instrument, ask to have it enforced otherwise than according to its terms. The court is not at liberty to introduce a shortcut to reformation by letting the jury strike out a clause."

In the present case, respondent did institute, in the first instance, an action for reformation. However, petitioner argues that the relief sought by respondent in such action was wholly unnecessary, and that the mutual mistake could have been pleaded as a defense in any subsequent action prosecuted by petitioner to recover on the policy. Hence, petitioner says that there was an "adequate remedy at law".

We do not concede the correctness of petitioner's premise that the reformation action was unnecessary or premature, on the theory that respondent could, under the present Federal Rules, plead mutual mistake if and when petitioner sued on the policy. Respondent might have been flirting with disaster had it waited until petitioner saw fit to sue upon the policy before the right to reformation was asserted, for a litigant who must seek correction of a written instrument for mutual mistake cannot risk delay after the mistake is discovered: compare *Snell v. Atlantic Fire and Marine Insurance Company*, 98 U.S. 85, 90 (1878); *American Life Insurance Company v. Stewart*, 300 U.S. 203 (1937).

But the basic vice in petitioner's argument is that it confuses the right of respondent to plead mutual mis-

take defensively in the Federal Court under modernized procedure, with the quite different question of whether, as of the time of the adoption of the Seventh Amendment to the Constitution, respondent could have pleaded such defense *in a law action,* which is the test of whether petitioner had a constitutional right to jury trial of such issue. An attempt to show that a written contract does not set forth the mutual intent and agreement of the parties raises an *equitable* issue, whether it be invoked affirmatively in a suit to reform the contract, or defensively in an effort to correct the contract on which the opposing party is suing. Its equitable character stems from the fact that, unless permitted by statute, a litigant could not rely at all in the law courts upon an alleged mistake made in recording the agreement of the parties in a written instrument. To do so clashed directly with the parol evidence rule. The integrity which the law courts must accord to a written agreement, when either of the contracting parties attempts to impeach it for mistake, was aptly stated by this court in *Union Mutual Life Insurance Company v. Mowry,* 96 U.S. 544, 547 (1878):

> "the entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be there stated. If, by inadvertence or mistake, provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have had recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected, the policy must be taken as expressing the final understanding of the assured and of the insurance company."

Professor Williston, in 2 *Williston on Contracts,* at page 1221, says that the parol evidence rule is a "rule of substantive law which, when applicable, defines the limits of a contract"; and later, at page 1224, he says:

> "All courts agree that if the parties have integrated their agreement into a single written memorial, all prior negotiations and agreements in regard to the same subject matter are excluded from consideration whether they were oral or written".

Petitioner agrees that a prior reformation of the policy by the court would be required, in the event the factual situation here were reversed and petitioner were complaining of a mutual mistake in the insurance coverage, as for example, if the hangar had been destroyed by windstorm instead of by fire, and petitioner had sought recovery on the policy by having the coverage changed from "fire" to "windstorm". But petitioner says that the same principle does not hold true, where it is the defendant in an action on the contract who must seek correction in the coverage of the policy. We do not agree with this concept, and the authorities are to the contrary.

Petitioner's briefs* assert that "mistake" has always been recognized as a legal defense in law actions. This is true with respect to certain types of "mistake", when invoked for the purpose of showing that no contract at all was ever effected between the parties. Such a mistake is found in the classic English case of *Raffles v.*

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* The reference is to petitioner's briefs filed in support of the petition for certiorari. No further brief had been filed by petitioner when this brief of respondent was printed.

Wichelhaus, 2 H. & C. 906 (1864), where, in a contract for the sale of cotton to be carried by the ship "Peerless" from Bombay, it appeared that the contracting parties had in mind two different ships by that name sailing from Bombay, so that no effective agreement was ever reached; and compare *Kyle v. Kavanagh,* 103 Mass. 356 (1869). Another type of "mistake" available as a defense at law is where the parties erroneously assumed the subject matter of their agreement was still in existence: *Paxton Lumber Company v. Panther Coal Company,* 83 W. Va. 341, 352 (1919).

But when it argues that, in the absence of a statute permitting the interposing of an equitable defense, a defendant could in a law action attack the integrity of the written instrument sued upon in the very teeth of the parol evidence rule, petitioner goes too far. The fallacy in the argument is that it makes no distinction whatsoever between the defense of "mistake" generally and the defense of "mutual mistake", the purpose of which is to show that the parties did reach an agreement, but failed to express their mutual intent correctly in the instrument. If respondent had attempted, by way of defense in a common law action on the policy, to assert, in effect, that the word "fire" had been mistakenly used in the place of the word "windstorm", the evidence would have been stricken and a verdict directed against petitioner, as the law courts could take no cognizance of such a defense. In its brief filed thus far, both in this Court and in the Court of Appeals below, petitioner has cited no case in which any such defense was permitted at common law.* The court decisions on the subject which we

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* At the bottom of page 6 of its brief accompanying the petition for certiorari, petitioner cited five cases in

have found hold squarely contrary to the petitioner's contention.

With respect to the different treatment which courts of equity and courts of law accord to mutual mistake in a written instrument, the general rule is well stated in 17 *Corpus Juris Secundum* 495:

> "A mistake of expression occurs where the parties are of the same mind regarding the terms of the agreement, but the writing intended to embrace those terms does not express their true meaning. Here in courts of law the contract must stand as it is written, for it is a well settled rule of evidence in those courts that parol evidence is not admissible to contradict, add to, or vary a writing * * *. Equity may in a proper case grant relief by way of reformation * * *."

Judge Parker stated the rule concisely in his opinion below in the present case:

> "No distinction exists between reforming the policy as a basis of suit and reforming it for the

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support of its argument that mutual mistake in the terms of a written contract could be pleaded as a defense at common law. But none of those cases are in point in a situation where the mistake involved, as here, a change in the language and meaning of the written contract. For example, the cited cases of *Wilson v. Queens Insurance Company*, 5 Fed. 674 (1881) and *U.S. v. Charles*, 74 Fed. 142 (1896) merely stand for the well-settled principle that, as a defense to a law action on a written instrument, the defendant may show the existence or non-existence of a certain fact upon which the entire agreement was conditioned. Such defense does not seek to change or correct the contract; it merely establishes that an effective contract never came into being. Compare *Raffles v. Wichelhaus* and *Kyle v. Kavanagh, supra.*

assertion of a defense; since the need in either case arises out of the rule at law that the parties are bound by the terms of the contract as written, and parol evidence to add to, alter or deny its terms is not admissible." (R. 29).

In *Allegheny Valley Brick Company v. Raymond,* 219 Fed. 477 (CCA 2, 1914), the defendant attempted, in its answer filed in a law action upon a written contract, to rely upon an alleged mutual mistake. The court held that such defense was not maintainable in the law action, saying at page 480:

> "It is, of course, within the province of a court of equity, in cases of mutual mistake, to make the written evidence of an agreement correspond to the understanding of the parties. A common-law court, however, possessed no such power. In some of the states the distinction between actions at law and suits in equity has been abolished, and a suit for the reformation of a written contract, which would under the former system have been a suit in equity, is in such states a civil action under the Code. But in the federal courts the distinction between suits in equity and actions at law is maintained, and in a common-law action, such as this is, a federal court is without power to reform a contract, or to recognize as an equitable defense the failure of one of the parties to perform a condition which is alleged to have been omitted by mutual mistake from the contract as written. * * *".

In *Garage Equipment Company v. Danielson,* 156 Wis. 90, 144 N.W. 284 (1913), there was a suit in equity to reform a written contract, and to enjoin an action at

law being prosecuted upon it. The defendant in the equity suit argued that the equity plaintiff had an adequate remedy at law, through the use of parol evidence in defense of the law action. But the Wisconsin court rejected this argument, saying:

> "Without reformation, plaintiff could not, in an action at law, avail itself of the affirmative defense of mutual mistake in the execution of the contract."

Two cases presenting factual situations similar to the present one are *Neary v. General American Life Insurance Company,* 140 Neb. 756, 1 N.W. (2d) 908 (1942), and *Williams Manufacturing Company v. Insurance Company of North America,* 95 Vt. 132, 113 Atl. 780 (1921). In the *Neary* case, a policy holder sued the defendant insurance company for the recovery of money after the policy matured. The defendant filed a cross-action alleging mutual mistake in the writing of the policy, in that, through inadvertence, the figure of "$2,000." had been inserted instead of "$1,000.". There was no jury trial; the court tried the reformation issue raised by the cross-action, found that a mutual mistake had been made, and allowed the necessary correction.

In the *Williams Manufacturing Company* case, an action at law was prosecuted upon a fire insurance policy insuring a veneer mill. The defendant insurance company pleaded the general issue, and under that plea sought to show that the parties had intended to insure another mill located in the same town. But the Vermont court held there could be no correction of the policy in the law action, and said:

> "* * * The contract which the parties executed insured the veneer mill; the contract they intended

> to make is, in the circumstances, of no consequence. If the parties intended to insure the sawmill, and there is much in the case to indicate they did, the policy cannot be corrected in this suit. As the policy now is, there is nothing for the court to do, but enforce the contract as it reads. * * *".

In *General Accident Fire and Life Insurance Company v. Owen Building Company*, 195 Mo. App. 371, 192 S.W. 145 (1917), there was an action by an insurance company to recover premiums upon certain policies. The defendant attempted to prove at the trial that the contract for the payment of the premiums was different from that stated in the policies. This testimony was objected to by plaintiff on the ground that it would contradict the written contract. The appellate court held that the trial court correctly excluded the evidence offered to change the meaning of the written contract, and quoted at length from the opinion of this Court in *Union Mutual Life Insurance Company v. Mowry, supra.*

And for similar applications of the parol evidence rule, see the following: *Van Syckel v. Dalrymple*, 32 N.J. Eq. 233 (1880); *Ewer v. Washington Insurance Company*, 16 Pickering 502 (1835); *Holmes v. Charlestown Insurance Company*, 10 Metcalf 211 (1845); and *New York, New Haven, etc. v. Preferred Underwriters*, 252 Mass. 1, 146 N.E. 905 (1925).

THE WEST VIRGINIA CASES

The right of petitioner to a jury trial is to be determined by Federal law, rather than state law: *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62 (CCA 3, 1943). Nevertheless, we cannot pass by unchallenged the contention made in petitioner's briefs that in West Virginia, at common law, a litigant

could defend against an action upon a written instrument by contending there was a mutual mistake in its terms. No West Virginia case cited by petitioner furnishes support for any such argument, and in fact the rule is just to the contrary.

In a law action, the West Virginia court has always accorded a written agreement the integrity which the parol evidence rule requires. For example, in *Hurst v. Hurst*, 7 W. Va. 289 (1874), an action at law was prosecuted to recover possession of real estate. At the trial, the defendant relied upon an alleged mutual mistake in the writing of the deed in qustion, asserting that by mistake it reserved a life estate to the grantor, whereas the intention had been to convey in fee simple title without any reservation. The West Virginia court held that such evidence was not admissible to impeach the deed in a law action.

In *Camden v. McCoy*, 48 W. Va. 377 (1900), and in *Buena Vista Company v. Billmyer*, 48 W. Va. 382 (1900), defendants in actions at law upon written contracts attempted to invoke parol evidence to modify the terms of the contracts. In both cases, the West Virginia court held that such evidence could not be received in the law actions.

And in *Knowlton v. Campbell*, 48 W. Va. 294, 296 (1900), the court in discussing relief against a mistake made in a written contract, said:

> "If it was intended that it should do so, there is a mistake in that contract. Suppose there is and that the contract does not say what it was intended it should say. Then it can be corrected only in equity, and cannot be affected upon a trial in an

action at law. "Courts of law act on the contracts of parties as they find them, and have no power to rectify a mistake not apparent upon the face of the instrument. Such relief is purely within the province of equity courts." 14 Ency. Pl. & Prac. 35. "A court of equity may reform a written contract where a suit is brought for the purpose, and it is alleged that by fraud, accident or mistake of the scribe, or by some other means the real agreement of the parties was not that which is expressed in such written agreement; but except when such a suit as this is brought, no parol evidence can be introduced to explain, alter or modify in any manner a written agreement." No verbal declarations or understanding of the parties at the time of the contract can be admitted."

3. Right to Jury Trial of an Equitable Issue is not Created by Statutes or Rules Permitting Pleading of Such Issue in Law Action.

The Seventh Amendment to the Constitution guarantees to a litigant a jury trial of those issues only which, as the practice stood at the time of the adoption of the Amendment, were recognized as legal issues triable by a jury, as distinguished from equitable issues triable by the chancellor: *Liberty Oil Company v Condon National Bank*, 260 U.S. 235 (1922). And statutory authority to plead equitable defenses in an action at law in the Federal Courts did not extend the right of jury trial to the issues presented by such defenses. By the Act of March 3, 1915, constituting Section 274 (b) of the Judicial Code,* the pleading of equitable defenses in law actions was authorized:

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* 28 *U.S.C.A.* 398.

"In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the defense of seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. * * *".

However, this Court has consistently held that any equitable defenses so pleaded were to be tried by the chancellor, and not by a jury. In *Liberty Oil Company v. Condon National Bank, supra,* at pages 242-3, this Court said:

"Where an equitable defense is interposed to a suit at law, the equitable issue raised should first be disposed of as in a court of equity, and then, if an issue at law remains, it is triable to a jury. * * * The equitable defense makes the issue equitable, and it is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law. * * * This was the practice in the courts of law and chancery in England when our Constitution and the 7th Amendment were adopted, and it is in the light of such practice that the 7th Amendment is to be construed."

In *Enelow v New York Life Insurance Company,* 293 U.S. 379, 382 (1935), on which petitioner places great reliance, this Court said:

"When the Congress enacted § 274 (b) of the Judicial Code, providing for equitable defenses in actions at law and the granting of affirmative equitable relief, the procedure was simplified but the

substance of the authorized intervention of equity was not altered. The court was empowered to exercise a summary equitable jurisdiction. Equitable defenses were permitted to be interposed in actions at law 'by answer, plea, or replication without the necessity of filing a bill on the equity side of the court'. The defendant is to have 'the same rights' as if he had filed a bill seeking the same relief. The equitable issue 'is to be tried to the judge as a chancellor'. The same order of trial is preserved as under the system of separate courts. *Liberty Oil Co. v. Condon Bank,* 260 U.S. 235, 242, 243, 67 L. Ed. 232, 234, 236, 43 S. Ct. 118. The trial of the issue at law may be postponed until the equitable issue is first disposed of, and then, if an issue at law remains, it is triable by a jury as the Seventh Amendment requires. * * *".

Nor did the adoption of the new Federal Rules of Civil Procedure enlarge the right to jury trial. The enabling Act of June 19, 1934, 48 Stat. 1064, 28 *U.S.C.A.* 723b, which initiated the movement for the new Rules, itself provided that "said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant"; and the courts are in accord that the Federal Rules were never intended either to enlarge or restrict the right to a jury trial.* In *Ettelson v. Metropolitan*

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* The new Federal Judicial Code, effective September 1, 1948, contains the following provision regarding rules of civil procedure (28 *U.S.C.A.* 2072):

"Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

Life Insurance Company, 137 F. (2d) 62, 65 (CCA 3, 1943), the Court said:

> "* * * Although under the Federal Rules of Civil Procedure claims and defenses formerly cognizable either at law or equity have been merged into one action, a civil action, the rules have neither enlarged nor diminished the right to either a jury or court trial. Basic issues formerly triable as of right by a jury are still triable by a jury as a matter of right. Rule 38, 28 U.S.C.A. following section 723c. The same obtains where the right previously existed to have an issue tried by the court. * * *".

To the same effect are: *Bellavance v. Plastic-Craft Novelty Company,* 30 F. Supp. 37 (D.C., Mass., 1939); *Bynum v. Prudential Insurance Company,* 7 F.R.D. 585 (E.D., S. C., 1947); *Logan v. Holman,* 7 F.R.D. 596 (D.C., N. J., 1947).

Rule 38(b) of the Federal Rules of Civil Procedure merely provides that a party may demand trial by jury "of any issue triable of right by a jury". There was no intention of giving the litigants an absolute right to jury trial except where they were entitled to that right under the Seventh Amendment.

Petitioner apparently conceives that, under the new Rules, respondent would have an "adequate remedy at law", because the defense of mutual mistake might be asserted in an answer filed in the one form of civil action for which the Rules provide. But the opportunity to plead an *equitable* defense under the new Rules does not accord to the parties the constitutional right to have such defense tried by a jury. If that theory were adopted, *all* issues pleaded defensively under the new

Rules would have to be tried by a jury, if either litigant demanded it.

The case of *Susquehanna Company v. Anderson*, 239 N. Y. 285, 146 N.E. 381 (1925), contains a significant discussion by Judge Cardozo on the subject of jury trial of an equitable defense. There the plaintiff sued for recovery of money upon a written contract. Without definitely pleading a counterclaim, the defendant sought to defend on the ground that, due to mistake, the writing was not a true expression of the intent of the parties. The trial court excluded the defendant's evidence regarding the alleged mistake, because a counterclaim for reformation had not been specifically pleaded. The Court of Appeals reversed, holding that the *equitable* defense of mistake was available to the defendant under Section 262 of the New York Civil Practice Act, even in the absence of a counterclaim. Judge Cardozo then discussed the question of whether this equitable defense in the nature of reformation should be tried by a jury or by the court. His conclusion was that a New York statute applicable to actions for the recovery of money expressly required the trial to be by jury; but at the same time he pointed out that a different procedure was followed in the Federal Courts. Judge Cardozo said (146 N.E. 384-5):

> "There remains for consideration the manner of the trial. Our statute provides that in an action for money only 'an issue of fact must be tried by a jury unless a jury trial is waived or a reference is directed.' Civ. Prac. Act. § 425; Code Civ. Pro. § 968. * * * There is no distinction in this respect between kinds of defenses, dependent upon their origin in equity or at law. The distinction is be-

tween all defenses on the one side and counterclaims on the other. Civ. Prac. Act § 424; Code Civ. Pro. § 974. The rule is settled under these provisions that equitable defenses are triable in the same way as defenses that are legal. * * * Possibly, though this is far from clear, a different construction might have been given to the statute in its beginnings. *The question was one not of constitutional privilege, but of the meaning of legislation. The Federal Courts have found it possible in construing the provisions of the Judicial Code (U. S. Comp. St. § 968 et seq.) to reserve to the judge the trial of equitable defenses while leaving the legal issues to the verdict of the jury.* Plews v. Burrage (CCA) 274 F. 881; Susquehanna Coal Co. v. Pratt & Young (CCA) 276 F. 919, 920; Union Pac. R. Co. v. Syas, 246 F. 561, 158 C.C.A. 531; cf. Liberty Oil Co. v. Condon Nat. Bank, 260 U.S. 235, 242, 43 S. Ct. 118, 67 L. Ed. 232; Nat. Aniline Co. v. Arnhold (D.C.) 298 F. 755; Lestrade v. Barth, 19 Cal. 671. Those provisions, however, when they are compared with the provisions of our statute, will be seen to be essentially different, though to some extent analogous. We are committed to another holding, not only by the reported precedents, but by the consistent practice of trial judges extending over many years. * * *". (Italics ours.)

Later in the same opinion, Judge Cardozo commented on the fact that an issue of mutual mistake, which sought a change in the terms of a written contract, would be somewhat confusing for a jury to handle. He said:

"Very likely there is danger of confusion and injustice at times in this blending of the issue.

Juries may find it difficult to apply the presumption that preliminary treaties are merged in the written contract if they are permitted to consider such treaties as evidence of mistake."

In effect, what Judge Cardozo pointed out in the above-quoted excerpts from his opinion was that, if the case before him, involving a mutual mistake or reformation defense in an action for the recovery of money on a written contract, had been in the Federal Court, rather than in a state court where the New York statute on jury trials controlled, the issue would be tried by the court and not by a jury. In such conclusion, we think he was clearly right.

II.

SINCE THE EQUITABLE ISSUE OF MUTUAL MISTAKE, RATHER THAN A LEGAL ISSUE, WAS INVOLVED, THE DISTRICT COURT'S ORDER FOR TRIAL OF SUCH ISSUE BY THE COURT SHOULD NOT BE INTERPRETED AS AN "INJUNCTION" ORDER APPEALABLE UNDER THE DOCTRINE OF ENELOW V. NEW YORK LIFE INSURANCE COMPANY, 293 U.S. 379 (1935) AND KINDRED CASES.

Petitioner relies upon *Enelow v. New York Life Insurance Company*, 293 U.S. 379 (1935); *Adamos v. New York Life Insurance Company*, 293 U.S. 386 (1935); and *Ettelson v. Metropolitan Life Insurance Company*, 317 U.S. 188 (1942). All of those cases followed the same procedural pattern: actions were instituted for recovery upon life insurance policies following the death of the insureds; by way of defense, the life insurance companies, relying upon alleged fraud in the applications for the policies, sought cancellation; and the District Courts ruled that the issue of fraud thus raised should be tried by the court without a jury, in advance of any trial of

the actions on the policies. This Court held that, in such procedural situation, an order directing trial of the fraud issue by the court, and postponing trial of the actions upon the policies, was equivalent to an "injunction," and therefore appealable under Section 129 of the Judicial Code.

But we think the present case is clearly distinguishable from those cases. Here, the *equitable* issue of mutual mistake in memorializing the agreement of the parties, and not the *legal* issue of fraud, is involved. Fraud has always been regarded as a defense pleadable at law against the enforcement of a contract. On the contrary, mutual mistake could not, in the absence of statutory authorization, be interposed as a defense to a law action on the written instrument; and even when pleaded under a statute, it would not lose its equitable character.

The clear distinction between the challenge to a written instrument for correction of mutual mistake, and a challenge under the guise of "cancellation" but based upon the legal defense of fraud, was aptly pointed out by Judge Parker in the opinion of the Court of Appeals in the present case:

> "* * * The case is distinguishable, therefore, from one involving a defense that the contract is void on the ground of fraud, which under the old practice constitutes a valid defense at law without equitable relief. See *Prudential Ins. Co. v. Saxe*, App. D.C. 134 F. 2d 16. Where fraud is the defense to existing liability under a policy, a suit in equity is not available because there is an adequate remedy

at law, *Phoenix Mutual Life Ins. Co. v. Bailey*, 13 Wall. 616; but this rule has no application where the policy must be reformed in equity before the insurer will be in position to assert the defense available to him under the true contract between the parties." (R. 29).

It is significant that after the *Ettelson* case went back to the Circuit Court of Appeals for the Third Circuit for a decision on the merits, that Court explored, as the decisive test for or against a jury trial, the question of whether fraud was historically available to the insurer as a legal defense to an action at law. The Court of Appeals stated its conclusion in *Ettelson v. Metropolitan Life Insurance Company*, 137 F. (2d) 62, 65-6 (CCA 3, 1943)*:

"* * * We find federal decisions going back for more than one hundred years in which, in suits on insurance policies, the question of fraud whether consisting of conscious or innocent misstatement or nondisclosure has been tried by a jury in an action at law on the policy.

* * * * * * *

"The issue on such a defense was tried by a jury prior to the present rules; it continues to be so triable since."

We have no quarrel with the doctrine of the *Enelow* case as applied to the trial of the *legal* issue of fraud, although it may be pointed out that the appealability rule there enunciated has been viewed elsewhere with

* Certiorari denied: 320 U.S. 777 (1943).

some misgiving:* *Beaunit Mills v. Eday Fabric Sales Corporation,* 124 F. (2d) 563, 565 (CCA 2, 1942); 3 *Moore's Federal Practice, 1947 Supplement,* pages 33-5; and 55 *Harvard Law Review* 861. But we do submit that this rule of appealability should not be further extended to apply to a case, like the present one, where the District Court, in litigation embodying no disputed legal issue, merely ordered the sole *equitable* issue to be tried by the court without a jury.

As Judge Parker said in the present case:

> "Piecemeal appeals should not be encouraged; and certainly there is no reason why they should be allowed from interlocutory orders merely because a legal counterclaim has been asserted to a suit in equity. Nothing in law or in logic nor any consideration of public policy demands any such extension of the doctrine of the *Enelow* and *Ettelson* cases. Trials ought not be delayed and appellate dockets crowded by appeals from interlocutory orders directing the course of litigation. * * *". (R. 30).

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* Judge Clark, who wrote the opinion in the *Beaunit Mills* case, *supra,* was the Reporter of the Advisory Committee which drafted the new Federal Rules of Civil Procedure; and Judge Dobie, who also served on the Advisory Committee, sat on the present case in the Court of Appeals below and concurred in the opinion dismissing the appeal.

III.

PETITIONER'S APPEAL WAS DISMISSIBLE BECAUSE, AS THE COURT OF APPEALS SAID, IN COMPLAINING OF AN ORDER FOR NON-JURY TRIAL OF AN EQUITABLE ISSUE THE APPEAL PRESENTED NO QUESTION OF SUBSTANCE.

Aside from the technical question of appealability under the doctrine of the *Enelow* case, the dismissal of the appeal by the Court of Appeals was right on the further ground that no question of substance was presented. As was pointed out by Judge Clark in *Ring v. Spina,* 166 F (2d) 546, 549 (CCA 2, 1948), the decision on the merits upon an appeal of this type is "inextricably intertwined with that of appealability". The Court of Appeals below thought petitioner's appeal was dismissible for lack of substance; Judge Parker said:

> "And even if the order allowing* jury trial were appealable, the motion to dismiss might well be allowed on the ground that the appeal presents no question of substance." (R. 30).

This court has said that though, in form, a reviewable question may be presented on the record, it will not be heard if it is so wholly wanting in merit as to be unsubstantial: *Brolan v. United States,* 236 U. S. 216, 218 (1915); *United States v. Lane,* 232 U. S. 598, 600 (1914).

As already pointed out, the issue for trial here in the District Court was not, as it was in the *Enelow, Adamos* and *Ettelson* cases, *supra,* the question of whether fraud on the part of the plaintiff vitiated the

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* It seems obvious that the word "allowing" was inadvertently used by the court here in place of "disallowing" or "denying".

written contract sued upon. The issue here was mutual mistake, under which it was necessary for respondent to show that the written contract did not correctly set forth the actual agreement of the parties. This has always been and still is an *equitable* issue, whether asserted in an action for reformation, or as a defense to an action on the contract as written. As Judge Parker aptly said in the court below:

> "The only issue in the case is the issue of mutual mistake. * * *
>
> "* * * No distinction exists between reforming the policy as a basis of suit and reforming it for the assertion of a defense; since the need in either case arises out of the rule at law that the parties are bound by the terms of the contract as written and parol evidence to add to, alter or deny its terms is not admissible. * * *." (R. 29).

While, under modern procedural devices, mutual mistake invoked to correct a written instrument may now be pleaded as a defense to an action on the instrument, rather than in an independent equity suit for reformation, the issue thus raised does not lose its equitable character, and is to be tried by the court without a jury. See: *Philippine Sugar Estates Development Company v. Philippines*, 247 U.S. 385, 388-9 (1918); *Donnelly v. Northwestern Life Insurance Company*, 59 F. (2d) 46 (CCA 5, 1932); and *Upson Nut Company v. American Shipbuilding Company*, 251 Fed. 707 (N.D., Ohio, 1918). In the *Philippines* case, *supra*, this Court said:

> "The case is brought here both by writ of error and by appeal. The complaint set forth a cause of action at law on the contract. The answer was, in

effect, a bill in equity for reformation, and incidentally to enjoin the action at law. * * * The proceeding became thus an equitable one. * * * The proper method of review by this court is, therefore, by appeal; and the writ of error is dismissed."

As this court said in *Liberty Oil Company v. Condon National Bank,* 260 U.S. 235, 242-3 (1922):

"The equitable defense makes the issue equitable and is to be tried to the judge as a chancellor. The right of trial by jury is preserved exactly as it was at common law."

Hence, it is conceived that the Court of Appeals was correct in saying that "the appeal presents no question of substance". (R. 30).

For the foregoing reasons, it is respectfully submitted that the Court of Appeals did not err in dismissing petitioner's appeal, and that its judgment should be affirmed.

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